

1 BEFORE THE SHORELINES HEARINGS BOARD
2 STATE OF WASHINGTON

3 DEAN SCHWICKERATH and DAVID
4 MASCARENAS,

5 Petitioners,

6 v.

7 CITY OF WESTPORT and LANCO, LLC,

8 Respondents.

SHB NO. 05-023

ORDER ON SUMMARY JUDGMENT

9 This matter comes before the Shorelines Hearings Board (Board) on Motions for
10 Summary Judgment filed by both the Petitioners Dean Schwickerath and David Mascarenas, and
11 the Respondents Lanco, LLC (Lanco). The Petitioners are asking the Board to reverse the
12 Shoreline Substantial Development Permit (SDP) issued by the City of Westport for the
13 redevelopment of the Islander Motel. The Respondent Lanco, on the other hand, asks the Board
14 to dismiss the petition challenging the granting of the SDP, and affirm the City's approval of the
15 SDP.

16 The Board was comprised of Chair Bill Clarke, and Members William H. Lynch,
17 Kathleen D. Mix, Mary Alyce Burleigh, and Judy Wilson¹. Administrative Appeals Judge Kay
18 M. Brown presided for the Board. Attorney Knoll D. Lowney represented the Petitioners.
19 Attorney Barnett N. Kalikow represented Respondent Lanco. Attorney Jeffrey S. Myers
20 represented the Respondent City of Westport.

21 _____
¹ Kevin Ranker, the 6th member on the panel, has chosen to recuse himself.

1 In rendering its decision, the Board considered the following submittals:

- 2 1. Notice of Appeal with attachments;
- 3 2. Motion for Summary Disposition filed by Lanco, Appendix 1, Declaration of Curtis
- 4 Crites; and Appendix 2, Westport Municipal Codes;
- 5 3. Motion for Summary Judgment filed by Appellants; Declaration of Knoll Lowney in
- 6 Support of Motion with attached Exhibits A through G;
- 7 4. Opposition to Respondents' Motion for Summary Judgment filed by Appellants with
- 8 attached provisions from the Westport Shoreline Master Program, and Declaration of
- 9 Dean Schwickerath in Opposition to Lanco's Motion for Summary Judgment;
- 10 5. [Response] to Appellants' Summary Judgment Motion filed by Lanco;
- 11 6. City of Westport's Response to Appellants' Motion for Summary Judgment,
- 12 Declaration of Jeffrey S. Myers with attached Exhibits A-1, A-2, A-6, C-1, C-4, E-1,
- 13 E-3, E-4, F-7, J-5, L-1, L-2, L-3 and Exhibit 1;
- 14 7. Reply to Petitioners' Opposition to Summary Judgment with attached JARPA
- 15 application; and,
- 16 8. Reply in Support of Motion for Summary Judgment.

17 Having fully considered the record in this case and being fully advised, the Board enters
18 the following ruling.

19 FACTUAL BACKGROUND

20 Lanco, LLC, the owner of the Islander Resort in Westport, plans to redevelop its existing
21 hotel and restaurant in the City of Westport. In its first phase of development, Lanco plans to
build 48 condominium units and a restaurant. The second phase involves the demolition of the
current motel/restaurant building and construction of a 75-unit hotel, a public viewing tower, and
a promenade along the Westport Marina. *Declaration of Lowney, Ex. A, C through G.*

The property is bounded on the north by the Pacific Ocean and on the south by the
Westport Marina. It sits on a peninsula that extends along the entire northern edge of the City of
Westport. The property is within 200 feet of the shoreline, and therefore the proposed project

1 requires a shoreline substantial development permit. *Declaration of Lowney, Ex. A, C through*
2 *G.*

3 On May 17, 2005, Lanco filed an application seeking approval of a shoreline substantial
4 development permit (SDP). At the time the application was submitted, the property was zoned
5 Mixed Use Tourist Commercial 1 (MUTC 1). The proposed hotel exceeded the height
6 requirement allowed in this zone, so a rezone from MUTC 1 to MUTC 2 was also sought.
7 *Declaration of Lowney, Ex. A, Declaration of Meyers, Exs. C-1.*

8 After receiving comments from the City, a revised Joint Aquatic Resources Permit
9 Application (JARPA) and supporting materials were submitted on June 7, 2005. The revised
10 application was determined to be complete, and a Notice of Complete Application and Notice of
11 Public hearing was issued on June 16, 2005. The notice included the information that the
12 applicants were seeking a rezone. The hearing was scheduled for July 19, 2005. The notice was
13 mailed to property owners of record within 300 feet of the subject site, including Petitioner Dean
14 Schwickerath, and was posted on the subject property. On June 16, 2005, the notice was also
15 published in two local newspapers. All of the notices included the information that a rezone was
16 being sought. *Declaration of Lowney, Ex. A, Declaration of Meyers, Exs. C-1, C-4.*

17 Due to a lack of a quorum, the July 19, 2005 meeting was continued to August 8, 2005.
18 Notice was mailed to property owners of record within 300 feet of the site, and to the parties of
19 record. Notice was also posted on the site. On July 28, 2005, the notice was published in three
20 local newspapers. *Declaration of Lowney, Ex. A, Declaration of Meyers, Ex. E-1, E-3, and E-4.*

1 The Planning Commission held a public hearing on August 8, 2005. One of the
2 Petitioners, Dean Schwickerath, submitted written testimony at the hearing. Following the
3 hearing, the Planning Commission approved the SDP, along with a recommendation to approve
4 the rezone. The City's decision was issued on August 18, 2005. The City Council also approved
5 the rezone on October 11, 2005. Petitioners did not appeal the rezone pursuant to the Land Use
6 Petition Act, Ch. 36.70C RCW, but they did appeal the approval of the SDP to this Board.
7 *Declaration of Lowney, Ex. A. Declaration of Meyers, Ex. J 5, L 1, L 2 and L 3.*

8 Both the Petitioners and Lanco have filed motions for summary judgment. A pre-hearing
9 conference was held at the Board, and a pre-hearing order was issued that established the issues
10 for the appeal. Although both sides purport to be seeking full summary judgment, Lanco has not
11 made arguments to support dismissal of all of Petitioners' issues as set out in the pre-hearing
12 order.² A finding in Petitioners' favor on any of their issues, however, could potentially be
13 sufficient to reverse the City's approval of the SDP.

14 ANALYSIS

15 A. Summary Judgment Standard

16 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
17 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
18 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party
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21 ² All references to issue numbers in this decision refer back to the pre-hearing order for this appeal issued on
October 13, 2005. The subparts to Issue No. 11 were further specified by letter filed by Petitioners on October 25,
2006. This process was specifically authorized in the pre-hearing order.

1 moving for summary judgment must show there are no genuine issues of material fact and the
2 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.,*
3 *Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment
4 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
5 451, 456, 824 P. 2d 1207, 1210 (1992).

6 The trier of fact must construe the evidence and consider the material facts and all
7 reasonable inferences therefrom in the light most favorable to the nonmoving party. *Weatherbee*
8 *v. Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If the moving party is a respondent
9 and meets this initial showing, then the inquiry shifts to the party with the burden of proof at
10 trial. If, at this point, the non-moving party fails to make a showing sufficient to establish the
11 existence of an element essential to that party's case, and on which that party will bear the burden
12 of proof at trial, then the trial court should grant the motion. *Young v. Key Pharmaceuticals,*
13 *Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

14 B. Board's Jurisdiction over Zoning

15 Petitioners have raised several issues related to the underlying zoning in the area in which
16 the redevelopment is to occur. In response to these issues, Respondents contend the Board lacks
17 jurisdiction over the projects compliance with the City of Westport's zoning code.

18 Generally, the Shorelines Hearings Board lacks jurisdiction to consider the consistency of
19 shoreline projects with local zoning, unless the zoning provisions are explicitly incorporated into
20 the shoreline master program. *Laccinole et.al., v. City of Bellevue, et. al.*, SHB No. 03-025,
21 (Order Granting Summary Judgment and Order of Remand)(March 10, 2004); *Faben Point*

1 *Neighbors et. al. v. City of Mercer Island, et. al.*, SHB No. 98-63 (Summary Judgment of
2 Dismissal for Lack of Jurisdiction)(May 5, 1999). Here, the Board concludes the Westport
3 zoning provisions are not expressly incorporated into the Westport Shoreline Master Program
4 (WSMP).

5 Petitioners point to language in the WSMP that directs development in the urban
6 shoreline to be consistent with Westport's underlying zoning designation (WMC 17.32.050(5)),
7 and identifies the mixed use/tourist commercial zone (MUTC) as a shoreline use zone (WMC
8 17.32.040(1)). The Board is not persuaded this establishes that the underlying zoning
9 designations have been incorporated into the WSMP such that the Board should take jurisdiction
10 over whether the SDP is consistent with the MUTC zoning.³ Local zoning provisions must be
11 explicitly incorporated into the shoreline master program, and thereby subject to the approval of
12 the Department of Ecology, in order for the Board to have jurisdiction, according to the Board's
13 prior decision in *Faben Point Neighbors*. Instead, the WSMP language merely reflects the fact
14 that development must comply with both the zoning code and the WSMP requirements, which
15 overlay the zoning. This type of language, in the words of the Board in *Faben Point Neighbors*,
16 reflects the "simultaneous governance of one project by several bodies of law and not the
17 incorporation of one body of law into another." *Faben Point Neighbors, Conclusions of Law No.*
18 *4.*

19 ³ Even if the language in the WSMP was sufficient to incorporate the MUTC zoning uses into the WSMP, the
20 Petitioners have not put forward a case establishing that the SDP at issue does not comply with the uses allowed in
21 the MUTC zone. Petitioners' arguments hinge on the fact that the height of the proposed hotel exceeds 35 feet,
which is the height limitation in the MUTC 1 zone. WMC 17.20A.060(6). However, the MUTC 2 zone does allow
buildings up to 50 feet. WMC 17.20A.060(6). In the WSMP, MUTC 1 and 2 are treated as a consolidated zone,
therefore any distinction between the two zones, or any argument that the project complies with one zone but not the
other, is irrelevant for shoreline purposes.

1 However, the project is subject to maximum height restrictions in both the Westport
2 zoning code and the Westport SMP. WMC 17.32.060(g)(4). In addition, the height restriction in
3 RCW 90.58.320 also applies to the proposed project. While the rezone may have changed the
4 applicable height restrictions under the zoning code, the rezone did not change the height
5 restriction applicable under the Westport SMP or the statute. Only the question of whether the
6 project violates the height provisions in the Westport SMP or in RCW 90.58.320 is properly
7 before the Board. That question involves disputed issues of fact requiring hearing, as discussed
8 in Section D, below. Because the Board lacks jurisdiction over Westport's zoning code,
9 Petitioners' issues regarding the rezone of the development area are also beyond the Board's
10 jurisdiction. Accordingly, summary judgment is granted to Respondents on Issues 2, 3 and 4.⁴

11 C. Public Notice

12 Petitioners contend that the public notice provided by the City was inadequate because it
13 failed to specify what they argue to be a critical fact – the height of the buildings. Petitioners
14 point to no legal requirement, however, that the public notice contain a statement of the height of
15 the project.

16 The Shoreline Management Act contains the following applicable notice requirements, at
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21 ⁴ The Board does not need to reach Respondent City's motion to strike paragraph three of Knoll Lowney's
declaration since the information contained in that paragraph goes to Issue 3, which the Board has concluded is
beyond its jurisdiction.

1 RCW 90.58.140(4):

2 Except as otherwise specifically provided in subsection (11) of this section, the local
3 government shall require notification of the public of all applications for permits
4 governed by any permit system established pursuant to subsection (3) of this section by
5 ensuring that notice of the application is given by at least one of the following methods:

6 (a) Mailing of the notice to the latest recorded real property owners as shown by the
7 records of the county assessor within at least three hundred feet of the boundary of the
8 property upon which the substantial development is proposed;

9 (b) Posting of the notice in a conspicuous manner on the property upon which the
10 substantial development is to be constructed; or

11 (c) Any other manner deemed appropriate by the local authorities to accomplish the
12 objectives of reasonable notice to adjacent landowners and the public.

13 Likewise, Department of Ecology's regulations set out similar notice requirements in WAC 173-
14 27-110, basically parroting the statute's requirements regarding the methods of notice. This rule
15 also requires that the following information be included in the notice:

16 (a) The date of application, the date of the notice of completion for the application, and
17 the date of the notice of application;

18 (b) A description of the proposed project action and a list of the project permits included
19 in the application and, if applicable, a list of any studies requested under RCW
20 36.70B.070, 36.70B.090 and WAC 173-27-180;

21 (c) The identification of other permits not included in the application to the extent known
by the local government;

(d) The identification of existing environmental documents that evaluate the proposed
project, and, if not otherwise stated on the document providing the notice of application,
such as a city land use bulletin, the location where the application and any studies can be
reviewed;

(e) A statement of the public comment period, which shall be not less than thirty days
following the date of notice of application, and statements of the right of any person to
comment on the application, receive notice of and participate in any hearings, request a
copy of the decision once made, and any appeal rights. A local government may accept
public comments at any time prior to the closing of the record of an open record
predecision hearing, if any, or, if no open record predecision hearing is provided, prior to
the decision on the project permit;

(f) The date, time, place, and type of hearing, if applicable and scheduled at the date of
notice of the application;

(g) A statement of the preliminary determination, if one has been made at the time of

1 notice, of those development regulations that will be used for project mitigation and of
2 consistency; and

3 (h) Any other information determined appropriate by the local government.

4 See also WMC 17.32.080(d)(2), which is almost identical to Ecology's rule.⁵ Nothing in the
5 statute or rule specifically requires the height of the project to be set out in the notice. The City's
6 notice complied with all of the legal requirements, and provided sufficient information such that
7 an interested member of the public could have pursued more specific information about the
8 project.⁶ The Board concludes that the notice was adequate, and that summary judgment should
9 be granted to Respondents on Issues 7 and 11 e.

10 D. Violations of WMC 17.32.060 – view provisions

11 Petitioners contend that the project, as approved, violates WMC 17.32.060(g)(4)(A) and
12 (B).⁷ These provisions of the Westport Shoreline Master Program provide:

13 (A) No permit shall be issued for any new or expanded building or structure of more than
14 thirty-five feet above average grade level on shorelines of the state that will obstruct
15 the view of a substantial number of residences on areas adjoining such shorelines
16 except where this master program does not prohibit the same and then only when
17 overriding considerations of the public interest will be served.

18 (B) Shoreline uses and activities shall be designed and operated to avoid blocking,
19 reducing, or adversely interfering with the public's visual access to the water and
20 shorelines.

21 See also RCW 90.58.320.

⁵ The Westport notice provision contains the additional requirement that the notice include the procedure and time limitation for commencing a challenge to the action. See WMC 17.32.080(d)(2)(A)(viii).

⁶ In fact, Petitioner Dean Schwickerath submitted written testimony at the August 8, 2005 Planning Commission Meeting.

⁷ Respondent Lanco's failure to structure their motion for summary judgment on the issues identified in the pre-hearing order makes their motion confusing for the Board and the other parties. It is not clear to the Board whether Lanco actually moved for summary judgment on this issue or not.

1 Respondent Lanco submitted no factual information regarding the view issue. In their
2 brief they argue that because the new structure will replace a two story hotel, reference to the
3 map will confirm there are very few second story structures that could even have residences that
4 are significantly obstructed by the proposed structure. Petitioners respond with the declaration of
5 Dean Schwickerath, in which Mr. Schwickerath discusses that he, and others he knows, will have
6 their views obstructed. The Board concludes that this response is sufficient to establish a
7 contested issue of fact, such that these issues should proceed to hearing. The Board denies
8 summary judgment on Issues 9, 10, 11(c), and 11(d). As discussed above, the height and view
9 issues before the Board are those based on RCW 90.58.320 and the Westport SMP, not those
10 based on the Westport zoning code.

11 E. Flooding

12 Petitioners challenge the City's approval of the SDP on the basis the project will cause an
13 increase in flooding. As legal authority for their contention Petitioners site SEPA in general, and
14 the policy section of the WSMP, specifically § B (7). WSMP Policy B (7) appears to primarily
15 address waste disposal, although it does include, in subsection c, a requirement that waterfront
16 land uses shall include measures to adequately convey and discharge stormwater runoff.

17 Respondents put forth, both in their motion and in reply, that this project is "highly
18 engineered" and that the expert evidence before the City was that the project would improve
19 drainage, not make it worse. The permit application, in § 7, contains a description of drainage
20 runoff provisions made for the project. The City, in its review of the application, notes that a
21 stormwater drainage plan has been prepared for the project and that prior to site plan approval

1 the project will be required to comply with provisions of the Stormwater Management Manual
2 for Western Washington, 2001 addition. *Declaration of Lowney, Ex. A, Findings of Fact §D, 18.*
3 This requirement is also included as a condition on the City's approval of the SDP. *Declaration*
4 *of Lowney, Ex. A, Condition 2.*

5 In response, Petitioners offer the Declaration of Dean Schwickerath, which includes his
6 first hand observations of waves topping the rocks north of Neddie Rose Drive, causing flooding
7 in the area of the Islander and down Westhaven Drive. The problem with this evidence is that it
8 is not tied to the project at all. Petitioners offer no evidence that the project will worsen the pre-
9 existing flooding problems observed by Mr. Schwickerath. Further, they offer no evidence that
10 the provisions contained in the permit and approved by the City to address stormwater runoff, are
11 inadequate. Summary judgment may be granted in favor of the respondent if the petitioner
12 "lacks competent evidence to support an essential element of the cause of action." *Wallingford*
13 *Community Council v. City of Seattle et. al.*, SHB 04-012 (Order Granting Partial Summary
14 Judgment), citing *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989);
15 *Seybold v. Neu*, 105 Wn.App. 666, 677, 19 P.3d 1068 (2001). In such a situation, the petitioner
16 must set forth specific facts showing there is a genuine issue for trial, and may not rely upon the
17 allegations made in its pleadings. *Young* at 225-27.

18 The Board concludes that Petitioners have not put forth sufficient facts relating to how
19 the project would cause flooding to survive Respondents' motion for summary judgment on this
20 matter. The Board grants respondents summary judgment on Issue 11 (f).

21 F. Parking

1 Petitioners also challenge the approved SDP for the Islander project on the basis of the
2 parking proposed in the plan. They contend that the approved parking is in violation of the
3 WSMP provision (WMC 17.32.055(1)(C)) and several other general zoning code provisions
4 related to parking. Both Lanco and Petitioners have moved for summary judgment on this issue.

5 The SDP allows parking on both the north and south side of the Islander Hotel and
6 Condominiums. On the north side, which lies along the Pacific Ocean, the parking is located
7 under the proposed building in a covered parking garage. On the south side, along the
8 Westhaven Cove and Marina, the parking as proposed would be separated from the water by a
9 public walkway, retail space, and a restaurant. Petitioners contend that the placement of parking
10 along the shoreline constitutes an inappropriate use of the shoreline.

11 As an initial matter, Petitioners make no argument as to why the Shoreline Hearings
12 Board would have jurisdiction over the zoning code provisions related to parking. As stated
13 earlier in this decision, the Board generally lacks jurisdiction over zoning issues. *See Supra*,
14 Analysis, Section B, and *Faben Point Neighbors*. Therefore, the Board grants summary
15 judgment to Respondents on the issue of whether the approved parking is consistent with general
16 zoning requirements.

17 WMC 17.32.055(1)(c), the parking provision contained in the WSMP, states that
18 “parking facilities should be placed inland away from the immediate water’s edge and
19 recreational beaches.” Petitioners contend that the proposed parking violates this provision
20 because parking has been placed “on grade” along the entire shoreline.

1 Because the issue of parking is very factually driven, and because there clearly is parking
2 very close to the shoreline, the Board believes hearing testimony and seeing the site is necessary
3 before it can rule on this issue. Therefore, the Board denies summary judgment on Issue 11(i),
4 except as to compliance with the zoning code provisions.

5 G. Seawalls/Overwater structures

6 Petitioners argue that the SDP should not have been approved because the project, as
7 proposed, includes new seawalls and new overwater structures that have never been disclosed.
8 Initially, both Petitioners and Lanco moved for summary judgment on this issue. In their reply
9 brief, Petitioners indicated they are now convinced there is a question of fact, and that this matter
10 should go to hearing. The Board agrees.

11 The facts, as presented by motion, are either in dispute or very confused. Respondent
12 Lanco originally states in its opening brief “There are no seawalls or over-water structures.” In
13 its reply briefing, however, Lanco states, “no building will take place below the OHM.”
14 Meanwhile, the maps show a “retaining wall by others.”

15 Petitioners, on the other hand, in their opening brief, claimed the seawall on the “site
16 plan” is waterward of the ordinary high water mark (OHWM). In their reply brief, however,
17 they state, “The plans show the ordinary high water mark as being waterward of the
18 development, but [the] OHWM does not appear to be plausible.”

19 The Board wants to hear evidence related to the seawall, its location relative to the
20 OHWM, and the relationship between the seawall and the Islander project. The Board denies
21 summary judgment on this issue to either party. Issues 11 (k) and (l) shall proceed to hearing.

1 **ORDER**

2 The Board answers Issue 2 in the negative, dismisses Issues 3 and 4 as beyond the
3 jurisdiction of the Board, answers Issue 7 “yes” and Issue 11(e) “no”, denies summary judgment
4 to either party on Issues 9, 10, 11(c) and 11(d), finds in favor of Respondent on Issue 11(f),
5 denies summary judgment on Issue 11(i), except as to zoning code allegations, and denies
6 summary judgment to either party on Issues 11(k) and (l). The following issues remain for
7 hearing:⁸

- 8 1. Whether Petitioners have standing to appeal to the Shoreline Hearings Board
9 (Board)?
10 5. Whether the SDP contains sufficient detail, both on its face and through
11 supporting and implementing documents, to determine whether the SDP is
12 consistent with the SMA, its implementing regulations, and the City of Westport’s
13 Shoreline Master Program (WSMP)?
14 6. Whether the JARPA provided the information required by the WSMP, WMC
15 17.32.080(b)?
16 8. Whether the City complied with SEPA prior to issuing the shoreline permits?
17 9. Whether the proposed project violates the WSMP’s height limitation in WMC
18 17.32.060(g)(4)(A) because it will block the view of a substantial number of
19 residences on areas adjoining the shoreline?
20 10. Whether the proposed project violates the WSMP’s provisions in WMC
21 17.32.060(g)(4)(B) because it will interfere with the public’s visual access to the
water and shorelines? (This issue includes issue 11 c and d).
11. Whether the proposed project is otherwise inconsistent with any specific
provision of the WSMP, Ch. 17.32 WMC, the SMA, and/or its implementing
regulations because:
a) the conditions attached to the permit are inadequate,
b) the project will have unacceptable cumulative impacts,
c) the City lacks adequate wastewater treatment facilities to serve
the development,
h) the project places parking on grade along the shoreline in
violation of WMC 17.32.055(1)(C),

⁸ The issues remaining for hearing have been consolidated and renumbered in places to facilitate an orderly approach to this appeal.

1 j) the project is not water dependent but will have negative impacts
on the shoreline,
2 k and l) the project includes new seawalls and new overwater
structures that have never been disclosed, are impermissible under
3 the WSMP, and are impermissibly piecemealed from the remainder
of the project.

4 12. Whether the permit should not have been approved because the project is
inconsistent with the Comprehensive Plan?

5
6 SO ORDERED this 5th day of January 2006.

7 **SHORELINES HEARINGS BOARD**

8 William H. Lynch, Chair

9 Bill Clarke, Member

10 Kathleen D. Mix, Member

11 Mary Alyce Burleigh, Member

12 (recused)

13 Kevin Ranker, Member

14 Judy Wilson, Member

15 Kay M. Brown, Presiding
Administrative Appeals Judge